HABIBAH MOHD ZAMAN

v.

PAN GLOBAL INSURANCE BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA THAMBY CHIK J
[ORIGINATING MOTION NO: R2-25-62-2000]
31 JANUARY 2001

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Quashing award of Industrial Court - Whether Industrial Court's findings were based on error of law and fact - Whether the Industrial Court has applied the "contract test" correctly to the facts and inferences of the case*

This was an application for judicial review by the applicant for an order of *certiorari* to quash the decision of the Industrial Court in *Pan Global Insurance Bhd v. Habibah Mohd. Zaman* and for an order of *mandamus* directing the Industrial Court to hear and determine case no. 3/4-290/98.

Briefly stated, the applicant was employed by the first defendant under the executive central filing department (the "central filing") until the time when the applicant constructively dismissed herself. The constructive dismissal was a result of the transfer of the applicant from the abovesaid department to executive-administration (the "general services") which job functions, responsibilities and duties were less responsible from those in the previous department. Under such circumstances, the applicant believed that the transfer was a demotion. Therefore, the applicant by letter served notice of protest after 3 1/2 days at the new position but the first respondent replied that it would not change its stand, hence she constructively dismissed herself. The applicant then lodged a complaint to the Regional Industrial Relations Office Ministry of Human Resources under s. 20 of the Industrial Relations Act 1967 and the matter was subsequently referred to the Industrial Court (the "second respondent"), whereby the award *Pan Global Insurance Bhd (supra)* was handed down.

Held:

[1] The second respondent had failed to consider para. no. 12 of the statement of case and hence, failed to see that the transfer was because the human resource and administration department of the first respondent was unhappy on its failure at the domestic enquiry to prove the serious charges such as theft and that the applicant was given a warning as punishment. Therefore by ignoring para. no. 12, the second respondent has erred in law as it is trite law that it should consider the pleadings, arguments etc.

[2] The reason that the first respondent gave the applicant a brief summary of her responsibilities in the general services department remains unanswered. The motive behind the first defendant's move may be actuated by *mala fide.* In this respect the second respondent has erred in law as it had not considered the applicant's arguments.

[3] The thrust of the first defendant's contention is that the work in both general services and central filing departments were administrative in nature. The second respondent had also agreed to this contention and thus found no fundamental breach that goes to the root of the contract. However, the applicant submitted that the job functions, duties and responsibilities should be considered. It is found that it is the job function, duties and responsibilities actually discharged by the particular employee which is important, and not merely the label that is attached to the particular employment.

[4] The first respondent's contention that the applicant had not attempted to carry out her duties need not be an issue. In *Wong Chee Hong v. Cathay Organisation,* the applicant is not required to make any attempt to perform the functions once the applicant regards or considers herself doing a far less responsible job. In this respect, the second respondent was found to have failed to compare the functions, duties and responsibilities of the applicant between the central filing and general services department.

[5] It is clear from the evidence that the first respondent reserved the right not to practise good industrial relations with regards to the transfer. It could have transferred the applicant to one of the 150 executive positions in insurance related work but it failed to do so. The second respondent did not consider the applicant's argument here and as such had erred in law.

[6] The first respondent contended that the applicant never raised fear of insubordination. However, the applicant was transferred soon after the domestic inquiry, it is therefore reasonable for the applicant to remain silent because of this fear. This is consistent to the state of mind of a person who had just been punished with a warning soon after the domestic inquiry. Therefore, silence on the part of the applicant of this fear does not vitiate her right to aver the same in her affidavit. This is an inference the second respondent failed to draw from the facts of the case.

[7] The first defendant's argument on condonation deserves no merit as the applicant had acted at the appropriate point in time soon after the conduct complained of had taken place, *ie* by dismissing herself as a reply to the effect that the first respondent would not change its stand on the transfer.

[8] The second respondent had erred in law when it did not scrutinise the first respondent's pleadings to discover that reorganisation was not pleaded by the first respondent. It is trite law that a party is bound by its pleading. This is despite the applicant's submission to urge the second respondent to look into the matter.

[9] From the case of *Air Space Management Services Sdn Bhd v. Co (B) Harbans Singh Chingar Singh*, it is clear that the High Court is entirely competent to disagree with the Industrial Court on the conclusions and inferences drawn by the latter from its findings of facts on the ground that no reasonable tribunal in the same position would have arrived at such a conclusion or drawn such an inference. Here on the facts and inference of the instant case the second respondent has not applied the "contract test" correctly to the facts and inferences. In such circumstances the application is allowed.

[Application allowed with costs.]

Case(s) referred to:

Air Space Management Service Sdn Bhd v. Co (B) Harbans Singh Chingar Singh [2000] 4 CLJ 77 ***(foll)***
Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155 ***(refd)***
Chua Yeow Cher v. Tele Dynamics Sdn Bhd [2000] 1 MLJ 168 ***(refd)***
Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia [1996] 4 CLJ 687 ***(refd)***
Kuala Lumpur Golf and Country Club v. Sapani Sharif [1999] 1 ILR 1000 ***(refd)***
Pan Global Insurance Bhd. v. Habibah Mohd Zaman [2000] 2 ILR 238 ***(not foll)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(foll)***
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 ***(foll)***
Western Excavating Ltd v. Sharp (CA) [1978] 1 KB 761 ***(refd)***
Wong Chee Hong v. Cathay Organisation [1988] 1 CLJ 45 ***(foll)***

Legislation referred to:

Industrial Relations Act 1967, s. 20(3)

Other source(s) referred to:

Law Relating to Transfer and Deputation of Employees, HC Arora and SL Sachdeva, pp 6-7

For the applicant - K Paramanathan (P Gunasegaram & WC Wong with him); M/s Paramanathan & Co
For the first respondent - HC Wong; M/s Ng Yook Woon Andrew TC Saw & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Faiza Thamby Chik J:

This is an application for judicial review for an order of *certiorari* to quash the decision of the Industrial Court *Pan Global Insurance Bhd. v. Habibah Mohd Zaman* [2000] 2 ILR 238 dated 25 May 2000 and for an order of *mandamus* directed to the Industrial Court to hear and determine the case No. 3/4-290/98 according to law by a different division from that which made the said award of the applicant's representation under s. 20(3) of the Industrial Relations Act 1967. In her affidavit affirmed on 4 July 2000 the applicant briefly states the facts of the case as follows: The applicant was in the employment of the first respondent until the time the applicant constructively dismissed herself from the employment of the first respondent. The constructive dismissal of the applicant was a result of the transfer of the applicant from executive central filing to executive-administration (general services) which job functions, responsibilities and duties are far less responsible from those of the job functions, responsibilities and duties in central filing. The applicant reasonably believes that the transfer came about as a result of the unreasonable complaint actuated by malice of the applicant's five subordinates. Thus the applicant considers herself that the far less responsible job functions, responsibilities and duties in the administration (general services) department were a demotion. Therefore the applicant by a letter dated 24 September 1997 marked as exh. HMNZ-14 at p. 82 of the applicant's affidavit served a sufficient notice by way of protest after 3 1/2 days at the new position at administration (general services) to the first respondent to rectify the matter and the first respondent replied in a meeting held on 30 September 1997 that the first respondent would not change its stand. Therefore the applicant constructively dismissed herself for reasons that the transfer letter dated 16 September 1997 marked as exh. HGMZ-13 at pp. 80-81 of applicant's affidavit gave no reasons for the transfer and was done with an improper motive to victimise the applicant, humiliating, frustrating and causing loss of estimation among the applicant's fellow colleagues and employees thus making it impossible for the applicant to carry on being employed in the employment of the first respondent. Thereafter the applicant lodged a complaint to the Regional Industrial Relations Office Ministry of Human Resources under s. 20 of the Industrial Relations Act 1967 and the matter was subsequently referred to the Industrial Court (second respondent) registered as case no. 3/4-290/98 whereby the second respondent handed down *Pan Global Insurance Bhd. v. Habibah Mohd Zaman* [2000] 2 ILR 238.

The jurisprudence of judicial review is well explained by the dissenting opinion of Wan Yahya FCJ in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 at p. 185 where he said:

The role of the High Court when exercising its supervisory jurisdiction on such instance as initially laid down in *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147 and *Associated Provincial Picture Houses v. Wednesbury* [1948] 1 KB 223, has been explicitly spelled out in various judgments of our courts. I need only to refer to the illuminating judgment of Jemuri Serjan SCJ (as he then was) in *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 1 MLJ 417 at pp. 420, 421 wherein he dealt with both the *Anisminic* and *Wednesbury* principles and in particular to the reproduction of Lord Reed's speech during which the following words appeared:

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decisions is a nullity. But in such cases, the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have miscontrued the provisions giving it power to act so that if failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.

He went on further and said at p. 186:

> In our present appeal, the failure of the Industrial Court to consider the issue raised by the appellant amounts to a serious error of fact and law which affected the jurisdiction of that court. In that event, even if the Industrial Court appeared to be hearing an application well within its jurisdiction, the error of law as revealed in the face of its record would entitle the High Court in exercising its supervisory function to quash that order.

Further, the subject of review was earlier brought in the case of *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 CLJ 748 at p. 780, VC George JCA said:

> In the course of the submissions made to us, Gopal Sri Ram JCA invited counsel's attention to the House of Lords decision in *Page v. Hull University Visitor* [1993] AC 682; [1993] 1 All ER 97 in which it can be seen that the effect of *Anisminic* was referred to both by the coram in that case, and by

Lord Diplock, to whose speech in *O'Reilley v. Mackman* [1983] 2 AC 237; [1982] 3 All ER 1124, reference was made, to mean something diametrically opposite to the effect given to *Anisminic* by *FireBricks*. Lord Browne-Wilkinson said at [1993] AC 6982 at p. 701; [1993] 1 All ER 97 at p. 107:

> In my judgment the decision in *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208, rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of *ultra vires*. Theceforward it was to be taken that Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision *ultra vires*. Professor Wade considers that the true effect of the *Anisminic* case is still in doubt; see *Wade* at p. 299 ff. But in my judgment the decision of this House in *O'Reilly v. Mackman* [1983] 2 AC 237; [1982] 3 All ER 1124, establishes the law in the sense that I have stated. Lord Diplock, with whose speech all the other members of the committee agreed, said that the decision in the *Anisminic* case:
>
> > has liberated English public law from the fetters that the courts had therefore imposed upon themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction. The breakthrough that *Anisminic* made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, ie one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination' not being 'a determination' within the meaning of the empowering legislation, was accordingly a nullity. (See [1983] 2 AC 237 at p. 278; [1982] 3 All ER 1124 at p. 1129.)

I am of the opinion that the second respondent had failed to consider para. no. 12 of the statement of case which reads as follows:

> 12. The Claimant contends and will contend that the decision to transfer was *mala fide* and not *bona fide* on the part of the Company. It amounted to an act to punish the Claimant in addition to the warning already served on her on 16.9.1997.

The second respondent failed to see that the transfer of the applicant was because the human resource and administration department of the first respondent was unhappy on its failure at the domestic enquiry to prove the

serious charges such as theft and the applicant was given a warning as punishment. If the second respondent had considered the submission of the applicant, it would have come to a different conclusion. The applicant's submission at pp. 190/191 of the applicant's affidavit is as follows:

> At page 39 of the Company's Bundle of Documents, at the Domestic Enquiry, the person who defended the Claimant (her colleague) objected to the then Assistant Manager being the investigating officer and the prosecuting officer at the domestic enquiry.
>
> At p. 41 of the company's bundle of documents, the then assistant manager admitted that he investigated the case.
>
> So we have a case of the investigator/prosecutor/unfair labour practiser (the then assistant manager of human resources and administration department, one Encik Abdul Harris Faizal) personally handing over the letter of transfer and telling her to pack her things to come up to the Fifth Floor.
>
> This is the same person to whom the claimant's lawyer had sent a letter before the domestic enquiry that he and the company had defamed her. (see p. 1 of claimant's bundle of documents: this letter was addressed to Encik Abdul Harris Faizal in his personal capacity as well). The findings of the enquiry was accepted by the claimant and it showed that she was not guilty of theft which was the most serious of the charges. The investigator/prosecutor/unfair labour practiser became more personally involved to see the Claimant transferred.

I must remind myself of what HC Arora and SL Sachdeva said in their book entitled *"Law Relating to Transfer and Deputation of Employees"* at pp. 6-7:

> The right to transfer an employee is a powerful weapon in the hands of the employer. Sometimes it is more dangerous than other punishments. Recent history bears testimony to this. It may, at times, bear the mask of innocuousness. What is ostensible in a transfer order may not be the real object. Behind the mask of innocence may hide sweet revenge, a desire to get rid of an inconvenient employee or to keep at bay an activist or a stormy petrol. When the Court is alerted, the Court has necessarily to tear the veil of deceptive innocuousness and what exactly motivated the transfer. This Court can and should in cases where it is satisfied that the real object of the transfer is not what is apparent examine what exactly was behind the transfer.

Therefore by ignoring the pleading in para. no. 12 given above and by not considering the above submission of the applicant, the second respondent has erred in law as it is trite law that it should consider the pleadings, arguments, etc.

The first respondent contended that the applicant has not proved or established "dismissal": Lawton LJ in *Western Excavating Ltd v. Sharp (CA)* [1978] 1 KB 761 at pp. 771 & 772 construed the concept what meaning was to be

applied to dismissal. His ultimate conclusion would be that "dismissal" is a noun connoting a state of affairs: the conditions of being sent away. What in law constitutes the state of affairs which is to be considered as "dismissal". The state of affairs would mean in the circumstances the applicant considers herself to be dismissed. I am of the view that what the applicant "considers" subjectively is the requirement under s. 20 of the Industrial Relations Act 1967. The first respondent's contention that the applicant's functions are wholly administrative in nature in the same department has no basis and is disputed by the applicant. What is important is the functions, duties and responsibilities in the general service department. Considering the fact that the applicant was employed for 18 years with the first respondent, why give the applicant a brief summary of her responsibilities in the general services department? A question remains unanswered: What is the motive of the first respondent? The answer is as shown below:

At p. 201 of the applicant's affidavit (from the written submission of the applicant to the Industrial Court) which reads as follows:

> It has been said that a picture speaks a thousand words and it is submitted that a list of duties also speaks a thousand words. It is surprising that the duty lists of COW-2 and COW-3 were not produced. The production of these duty lists would have enabled the Court to see what their duties were and whether they had handed over the least responsible duties or the most responsible duties to the claimant.
>
> It has been shown as a fact in para. 5 of this submission that although claimant was in the same department in her former job at central filing, she had no duty list.
>
> Non production of the duty lists of COW2 and COW3 can lead to only one conclusion: Claimant was the only one in the department with a duty list. Why?

When the applicant was being cross examined, the court asked the following questions: At p. 236 of the applicant's affidavit:

> Q. By Court: Do you have a list of job functions given to you when you were employed as Exec. Filing.
>
> A. No.

At p. 42 of applicant's affidavit, the applicant has stated in para. no. 17 that she verily believed that the previous officers and the clerk who assigned to her their job functions and responsibilities had no list of job duties assigned to them.

The applicant in her submission has stated at p. 17 of the applicant's submission that:

> The First Respondent has failed to state the reasons as to why those who handed over part of their duties to the Applicant had no list of duties.

Up to date the first respondent has not said why the applicant was the only one who had a list of duties.

Does this not show *mala fide*?

I therefore conclude that the second respondent has erred in law as it has not considered the applicant's arguments.

The whole thrust of the first respondent's contention is that the work in both administration general services and central filing was administrative in nature. The second respondent has also agreed to this contention and thus found no fundamental breach which goes to the root of the contract. The thrust of the applicant's submission is that the job functions, duties and responsibilities should be considered. I think the use of labels attached to a particular job is misleading; one should look at the job functions, duties and responsibilities. In *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia* [1996] 4 CLJ 687; at p. 702 the court said:

> This shows the true principles: that it is the function of and the duties actually discharged by the particular claimant that is important and not merely the label that is attached to the particular employment or indeed the purpose of the engagement.

The first respondent's contention that the applicant has not attempted to carry out her duties need not be an issue at all as the requirement of the law in *Wong Chee Hong v. Cathay Organisation* [1988] 1 CLJ 45 does not require the applicant to make any attempt to perform the functions once the applicant regards or considers herself doing a far less responsible job. I think the second respondent failed to compare the functions, duties and responsibilities of the applicant in the central filing as opposed to the functions, duties and responsibilities in the general services which the applicant performed for 3 1/2 days.

The transfer of the applicant to general services was not the first and only transfer in her entire 18 years of working life with the first respondent. The applicant recognises the prerogative of the management to transfer but also its limitations in respect of transfers. The applicant offers no challenge to the issue of the prerogative of transfer save that the right to transfer is not used abusively or *mala fide*. The applicant has at pp. 27-28 of the applicant's submission laid out the limitation to the transfer i.e.:

(i) There is nothing to the contrary in the terms of employment:

The first respondent disregarded the terms of employment as to the functions, duties and responsibilities of the applicant transferring her to a far less responsible job to the general services department.

(ii) The management has acted *bona fide* and in the interests of its business:

To this, we humbly submit that the management has acted *mala fide* in that the applicant was not consulted on the transfer; where no reasonable employer would have undertaken such a step with a long serving employee.

(iii) The management is not actuated by any indirect motive or any kind of *mala fide*:

To this we humbly submit that the management is actuated by indirect motive or *mala fide*.

(iv) The transfer is not made for purpose of harassing and victimising the workmen:

To this we humbly submit that the transfer was made for the purpose of putting the applicant to inconvenience and loss of estimation and unreasonably assuming that there would be disharmony as the following will show:

If the second respondent had considered the applicant's submission at pp. 202 & 203 of the applicant's affidavit, which reads as follows it would not have accepted preservation of industrial harmony as a valid ground for the applicant's transfer:

> The Company Witness, COW-4, on cross examination. Said there were 150 executives in insurance related work.
>
> During cross examination of the Claimant, it was shown that she rose from the Grade E8 to E7 while continuing to occupy the same post at Central Filing. It was also brought in during examination-in-chief of COW-3 that COW-3 although in Grade E6 was occupying the post similar to others in E7.
>
> As such the Claimant could be posted to any of the insurance related departments by way for example by mutual transfer and industrial peace would have been maintained.
>
> It is submitted that the transfer of the Claimant was effected to take sweet revenge.

The above is confirmed from the notes of evidence recorded at p. 285 of the applicant's affidavit which reads as follows:

Q. (witness referred to CL-4) altogether 7 Exec position in that HR & Admin. How many Execs did you have in your Ins, related Depts.

A. About 150.

Therefore the first respondent could have transferred the applicant to one of the 150 executive positions in insurance related work when she sent her letter dated 24 September 1997 (see p. 82 of the applicant's affidavit) whereby she wanted the matter rectified as she felt that she was demoted. This was not done.

It is clear that the stand of the first respondent was that it could transfer an employee to preserve industrial harmony but it reserved the right not to practise good industrial relations as the following will show (at p. 286 of the applicant's affidavit):

Q. You said if she was not transferred there would be disharmony between her and her subordinates. Why did you not mention this in the transfer letter?

A. Because it is not necessary.

By its failure to consider the above, the second respondent has erred in law as it had not considered the applicant's arguments.

(v) The transfer does not involve a change in the conditions of service:

The applicant's transfer to mere clerical duties as described in para. 8 at pp. 44 - 45 of the applicant's affidavit clearly indicates a change in the conditions of service.

Thus the first respondent has committed a fundamental breach going to the root of the contract of employment.

The second respondent has not applied the contract test to the facts and inference of the facts. The first respondent's contended that the applicant never raised fear of insubordination. I think it is accepted that disobedience to a lawful order of an employer is insubordination and this would result in disciplinary action. In the instant case the facts will show that the applicant was transferred to general services under an order of the first respondent soon after the domestic enquiry. It is therefore reasonable for the applicant to elect to remain silent because of this fear. This is consistent to the state of mind of a person who had just been punished with a warning soon after a domestic enquiry. Therefore silence on the part of the applicant of this fear does not vitiate her right to aver the same in her affidavit. This is an inference the second respondent failed to draw from the facts of the case. And the case of *Chua Yeow Cher v. Tele Dynamics Sdn Bhd* [2000] 1 MLJ 168 adduced by the first respondent is of no relevance to the issue. The facts of the case

indicate that this case is based on transfer from one branch to another whereas in our instant case is a case of transfer within the department. It must be observed that the first respondent's contention on lateral interdepartmental transfer is not a dispute at all save the job functions, duties and responsibilities. The applicant's prior position was not an issue and the applicant never complained about the transfer to central filing.

I am of the view that if the need is on the applicant to familiarise herself with her new job which is the contention of the first respondent, then any delay in giving notice would be condonation of the fundamental breach of contract. It is in evidence that company witness No. 3 (COW3) an administration executive's answer to the cross examination by the applicant's counsel was as follows:

> Q. How long did you take to know your work since you joined the Company?
>
> A. Probably about a month (at p. 274 of applicant's affidavit).

Hence, a month would show condonation of the breach by the applicant. The applicant being a long serving employee of 18 years with the first respondent and who had undergone transfers to other insurance related departments, would be in a good position to make an assessment of the new position and find the new position as far less responsible. (at pp. 198 – 199 of the applicant's affidavit). The first respondent's argument that condonation would only apply where a person who has had the full understanding and comprehension of the circumstances he is faced with, fails to take action even though it is so glaring that there is apparent detriment. However in the instant case the applicant in the circumstances considered herself dismissed. The applicant after 3 1/2 days at the new position sent a notice dated 24 September 1997 to the first respondent "to rectify the matter" and waited from 24 September 1997 to 30 September 1997 for the response from the first respondent which came at the closing minutes of that date i.e. 30 September 1997. The response of the first respondent was that it will not change its stand on the matter. In the circumstances of the case, the applicant's failure to act would amount to condonation. By virtue of the principles of *Wong Chee Hong v. Cathay Organisation*, the applicant should make up her mind and act at the appropriate point in time soon after the conduct complained of has taken place. In this instance, the Applicant should act at the appropriate point in time soon after the conduct and that would be immediately after the act complained of i.e. the reply to the effect that the first respondent will not change its stand on the matter. The first respondent's reference to the case of *Kuala Lumpur Golf and Country Club v. Sapani Sharif* [1999] 1 ILR 1000 on the prematurity on the part of the employee can hold no water. The *ratio decidendi* in *Wong Chee*

Hong v. Cathay Organisation requiring the applicant to act at the appropriate point in time failing which waiver would be presumed under the *Wong Chee Hong v. Cathay Organisation*. I am of the view that the case of *Kuala Lumpur Golf and Country Club v. Sapani Sharif* [1999] 1 ILR 1000 has no relevance here as it involves a case on reorganisation. There is no such pleading on reorganisation by the first respondent in his pleadings. It is trite law that a party is bound by its pleadings. In *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, it is stated:

> It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinize the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regards to the issues. It is true that the Industrial Court is not bound by all the technicalities of a civil court (s. 30 of the Act) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to a wrong conclusion.

In the instant case the second respondent if it had scrutinised the pleadings of the first respondent, it would have come to a conclusion that reorganisation was never pleaded. This fact was brought to the attention of the second respondent by the applicant's submission at the Industrial Court as shown below (at p. 199 of the applicant's affidavit):

> Respectfully we urge Yang Arif to distinguish this case from the case of *Kuala Lumpur Golf and Country Club v. Sapani Sharif* [1999] 1 ILR 1000, wherein Yang Arif had held that an employee who had worked in the new position for 4 1/2 days had reacted prematurely in claiming constructive dismissal. It was held by Yang Arif that the claimant employee should have stayed on a little longer until the reorganisation exercise has been completed and situations were a bit clearer.
>
> We submit that this case before Yang Arif is different from that or *Sapani*'s case on its facts. Moreover the reorganisation of the Human Resources and Administration was brought out for the first time during the cross examination of COW-4 and it is submitted that it was not pleaded in the Company's pleadings.
>
> So it is not reliable for Yang Arif to draw a similar conclusion on this case.

Inspite of drawing attention of the second respondent to this point of law, it had ignored it and found as a fact that there was reorganisation. This is clear from p. 218 of the applicant's affidavit where the second respondent has used

Sapani's case as authority for his conclusion that working for 3 1/2 days was not enough. The *ratio decidendi* of *Sapani*'s case is that when there is reorganisation the person in the new job should stay a little longer until the situation has become clearer. Therefore it is clear that the second respondent has erred in law.

From the case of *Air Space Management Service Sdn Bhd v. Co (B) Harbans Singh Chingar Singh* [2000] 4 CLJ 77, it is clear that if the Industrial Court has accepted or rejected the evidence of a particular witness and goes on to make a finding based on such acceptance or rejection, the High Court is bound to accept such finding. However, it is also clear the High Court is entirely competent to disagree with the Industrial Court on the conclusion or inferences drawn by the latter from its findings of facts on the ground that no reasonable tribunal in the same position would have arrived at such a conclusion or drawn such an inference. There the court stated:

> On the other hand, we accept, of course, that it is entirely competent for the High Court in *certiorari* proceedings to disagree with the Industrial Court on the conclusions or inferences drawn by the latter from the proved or admitted evidence on the ground that no tribunal similarly circumstanced would have arrived at such a conclusion or drawn such an inference.

Here on the facts and inference of the instant case the second respondent has not applied the "contract test" correctly to the facts and inferences. In *Chief Constable of the North Wales Police v. Evans* [1982] 1 WLR 1155 at p. 1173 Lord Brightman referred to the Lord Everhed's consideration to a "danger of usurpation of power on the part of the courts ... under the pretext of having regard to the principles of natural justice". He added:

> I do observe again that it is not the decision on such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity of putting his case.

In such circumstances I allow for an order in terms of (1), (2) and (3) of the application with costs.